IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No. 1120-SB of 2002
Date of Decision: 05.08.2010

Babu Lal son of Richhpal, resident of village Aalupur, District Alwar, Rajasthan.

... Appellant

Versus

The State of Haryana.

...Respondent

Criminal Appeal No. 1225-SB of 2002
Date of Decision: 05.08.2010

1. **Sanjay @ Tita son of Sh. Ram Parshad, resident of village Silothi, District Faridabad.**

2. **Sumer son of Yad Ram, resident of Amroli, District Faridabad.**

... Appellants

Versus

The State of Haryana.

...Respondent

Criminal Appeal No. 1766-SB of 2002
Date of Decision: 05.08.2010

Nandu son of Ram Lakhan, resident of Sanwarsa, P.S. Chaviya Jingonda, District Gurgaon.

... Appellant

Versus

The State of Haryana.

...Respondent

CORAM: HON'BLE MR. JUSTICE SHAM SUNDER

Present: Mr. Gautam Dutt, Advocate,
for the appellants,
in all the appeals.

Mr. Sandeep Mann, Senior Deputy Advocate General,
Haryana, for the respondent – State.

SHAM SUNDER, J.

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This judgement, shall dispose of Criminal Appeal No. 1120-SB of 2002, filed by Babu Lal, Criminal Appeal No. 1225-SB of 2002, filed by Sanjay @ Tita and Sumer, and, Criminal Appeal No. 1766-SB of 2002, filed by Nandu, accused, against the judgement of conviction dated 12.06.02, and, the order of sentence dated 15.06.02, rendered by the Court of Additional Sessions Judge, Gurgaon, vide which, it convicted the accused and sentenced them, as under:-

Names of the accused (now appellants)		**Offence for which convicted**		**Sentence awarded**
1		**2**		**3**
(i) (ii) (iii)	Nandu Sanjay @ Tita Sumer	(a)	Under Section 395 read with Section 397 of the Indian Penal Code.	To undergo rigorous imprisonment, for a period of 07 years each, and, to pay a fine of Rs. 2,000/- each, and, in default of payment thereof, to further undergo rigorous imprisonment, for a period of 02 months each.
(iv)	Babu Lal	(b)	Under Section 412 of the Indian Penal Code.	To undergo rigorous imprisonment, for a period of 05 years, and, to pay a fine of Rs. 2,000/-, and, in default of payment thereof, to further undergo rigorous imprisonment, for a period of 02 months.

2. On 04.06.2000, at about 8.15 PM, Manoj Kumar alongwith

his companion Mohd. Idrish, resident of Dhulawat, who used to work with him, was present, at Deepa Filling Station, Taoru. One Maruti car, in which five persons, were present, came there. Out of the said persons, one person came down, from the car, and, demanded petrol for Rs. 100/-. Manoj Kumar, filled the petrol, in the tank of the car for Rs. 100/-. A sum of Rs. 100/-, in cash, was paid, by that person, and, he asked for receipt. When Manoj Kumar, asked Mohd. Idrish, to prepare the cash memo for Rs. 100/-, and, he (Mohd. Idrish), went towards the office, that person also followed him. Thereafter, three boys also came down, from the car. As soon as he (Manoj Kumar), started going towards the cooler, to drink the water, he was caught hold by his collar, by one boy, and, country-made pistol, was put, on his ear-pit. Manoj Kumar and Mohd. Idrish, were taken inside the office. Those boys also entered the office. The boy, who was armed with the country-made pistol, first of all, cut the telephone wire. The boy, who asked for petrol, took out a spring actuated knife, and, put the same, on the ear-pit of Mohd. Idrish. They took out a sum of Rs. 32,000/-, from the drawer of the table and also one colour television and its remote alongwith receiver. Thereafter, they bolted Manoj Kumar and Mohd. Idrish, inside the office. One person named Moji, came there, to take petrol. After hitting the country-made pistol, from its reverse side, on his head, they also bolted him, inside the office alongwith Manoj Kumar and Mohd. Idrish. Thereafter, those boys, after sitting in the car, went away towards Nuh side. Manoj Kumar and Modh. Idrish, after

jumping out of the window, came outside, and, in that process they sustained injuries. The number of the car, could not be noted down by them. However, Manoj Kumar and Mohd. Idrish, claimed that, in case, those boys, were produced, before them, they could identify them. On the basis of the statement of Manoj Kumar, the first information report, was registered. During the course of investigation, the accused, were arrested, and, a sum of Rs. 1200/- cash and BPL colour television alongwith its remote, were recovered, from Babu Lal. After the completion of investigation, they were challaned.

3. On their appearance, in the Court of the Committing Magistrate, the accused, were supplied the copies of documents, relied upon by the prosecution.

4. After the case, was received, by commitment, in the Court of Sessions, charge under Sections 395 and 397 of the Indian Penal Code, was framed, against Nandu, Sanjay alias Tita, Sumer and Babu Lal alias Babu, accused. Separate charge under Section 412 of the Indian Penal Code, was also framed, against Babu Lal, accused. The charge was read over and explained, to the accused, to which, they pleaded not guilty and claimed trial.

5. The prosecution, in support of its case, examined Har Parshad, Head Constable (PW1), in whose presence, Mohd. Idrish, identified the television and its remote control, as the case property, Puran Singh, Head Constable (PW2), who joined the investigation alongwith the Investigating Officer, Sarwan Kumar, Draftsman (PW3),

who prepared the scaled site plan PD, Mukhtiar Singh, Constable (PW4),before whom, Nandu, made a disclosure statement PE, but, no recovery, was effected, Rakesh Kumar, Constable (PW5), who deposed, with regard to the disclosure statement, having been made by Babu Lal, accused, as a result whereof, he got recovered the television and cash, Kailash Chand, Ahlmad (PW6), who brought the case file 'State Vs. Karma Singh etc., in which, the accused, were also named, Dr. Harvinder Kaur, Medical Officer (PW7), who medico-legally examined Moji, Manoj Kumar and Mohd. Idrish, and, found the injuries, on their person, Ram Pal, Sub Inspector (PW8), who recorded the first information report PK, on receipt of ruqa, Randhir Singh, Inspector (PW9), who proved the disclosure statements of Sanjay alias Tita, Sumer and Satish accused, suffered by them in a criminal case, registered at Police Station Chandhut, District Faridabad, as also recovery memos of the weapons of offence, Manoj Kumar, complainant-cum-injured (PW10), who in his examination-in-chief, in clear-cut terms stated that, the accused, who were present, in the Court, were not those persons, who came to the petrol pump and caused injuries, on their person, Keshav Ram, Sub Inspector (PW11), who took into possession, Maruti car, bearing No. DNA-1400, Randhir Singh, Inspector (PW12), who arrested five accused, in case FIR No. 396/2000, under Sections 399 and 402 of the Indian Penal Code, Police Station Sadar, Gurgaon, in which, Nandu, accused, was also involved, and who suffered a disclosure statement, Satish Kumar, Constable

(PW13), who proved the disclosure statement of Babu Lal, in pursuance whereof, he got recovered the television alongwith its remote and currency notes, Manjit Singh, Sub Inspector (PW14), who prepared the challan, against the accused, Daya Nand, Moharrir Head Constable (PW15), with whom, the Maruti car, in question, was deposited, Raj Kumar, Head Constable (PW16), with whom, the weapons, used by the accused, in another case FIR No. 199 dated 09.08.2000, were deposited, Mohd. Idrish, injured-cum-eyewitness (PW17), who during the course of his cross-examination stated that, he only came to know about the accused, when they were shown, to him, in Police Station Daruhera, by the Police, Manphool Singh, Assistant Sub Inspector (PW18), the Investigating Officer, and, Jagjit Singh, Sub Divisional Judicial Magistrate, Gulla (PW19), who stated that, an application, was moved, before him, and, the accused, were asked, as to whether, they wanted to participate, in the identification parade, but, they refused to do so. Thereafter, the evidence was closed by the prosecution.

6. The statements of the accused, under Section 313 of the Code of Criminal Procedure, were recorded. They were put all the incriminating circumstances, appearing against them, in the prosecution evidence. They denied all the allegations, and, stated that, they were falsely implicated, in the instant case. They also disputed their identity. They, however, did not lead any evidence, in defence, and closed the same.

7. After hearing the Counsel for the parties, and, on going through the evidence, on record, the trial Court, convicted and sentenced the accused, as stated above.

8. Feeling aggrieved, the instant appeals, were filed by the appellants.

9. I have heard the Counsel for the parties, and, have gone through the evidence and record of the case, carefully.

10. The Counsel for the appellants, submitted that, since the alleged fifth person, was neither traced, nor his identity was established, nor was he challaned, and the charge, was framed only against four persons, no offences, punishable under Sections 395 and 397 of the Indian Penal Code, were committed, by the accused. He further submitted that, for constituting the offence of dacoity, there must be five or more persons. He further submitted that, even the identity of the accused, as the perpetrators of crime, was not proved, as also, it was not established, that the articles, allegedly got recovered, by Babu Lal, accused, were the same, in respect whereof, the dacoity, was allegedly committed, and, as such, the trial Court, wrongly convicted the accused. He further submitted that the judgement of conviction and the order of sentence, rendered by the trial Court, being illegal, are liable to be set aside.

11. On the other hand, the Counsel for the respondent – State, fairly admitted, that since charge, was only framed, against four persons, and, the identity of the fifth person, never came to light, nor,

he could be traced, the offence of dacoity, was not constituted, and, as such, the accused, did not commit the offences, punishable under Sections 395 and 397 of the Indian Penal Code. He further submitted that, from Babu Lal, accused, the television and cash, in respect whereof, the dacoity, was committed, at the petrol pump, were recovered, and, thus, the trial Court, rightly convicted him for the offence, punishable under Section 412 of the Indian Penal Code. He further submitted that, the accused, refused to participate, in the identification parade. He further submitted that, though, the complainant and his companion, could not identify the accused, as those persons, who were the perpetrators of crime, during the course of their evidence, in the Court, yet refusal on the part of the accused to participate, in the identification pardade was sufficeint to prove their identity.

12. First coming to the question, as to whether, the offences, punishable under Sections 395 and 397 of the Indian Penal Code, were committed by the accused or not, it may be stated here, that they did not commit such offences. Section 391 of the Indian Penal Code, which defines dacoity, is reproduced hereunder:-

> "When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

The plain reading of the provisions of Section 391 of the Indian Penal Code, clearly goes, to show, that for constituting the offence of dacoity, there must be five or more than five persons. In the instant case, as stated above, the identity or the name of the alleged fifth person, could not be ascertained, by the Police, nor, he was arrested, nor challaned. Only four persons, who allegedly committed the crime, were challaned, and, the charge, was framed, against them. Under these circumstances, the ingredients, required for constituting the offences, punishable under Sections 395 and 397 of the Indian Penal Code, were not fulfilled, from the evidence, on record. The trial Court, without adverting to the provisions of Section 391 of the Indian Penal Code, wrongly convicted the accused, for the offences, punishable under Sections 395 and 397 of the Indian Penal Code.

13. Not only this, even the identity of the accused, as the perpetrators of crime, was not established, by the prosecution, beyond a reasonable doubt. The alleged occurrence took place at night. The features and description of the accused were not mentioned in the FIR. The accused were not earlier known to Manoj Kumar or Mohd. Idrish. Manoj Kumar, complainant, PW10, in clear-cut terms stated, in his statement that, the accused, who were present, in the Court, were not those persons, who came to the petrol pump and took away the cash, as also the television alongwith its remote. Mohd. Idrish, PW17, in his examination-in-chief, no doubt, stated the names of the persons. However, during the course of his cross-examination, it was stated by

him, that he made such a statement, as he was tortured by the Police, to do so, otherwise, he was threatened to be involved in a false case. Not only this, he stated in his cross-examination that, for the first time, he was shown the accused, in the jail. The cross-examination of Mohd. Idrish, therefore, clearly showed, that actually, he could not identify the accused, as the perpetrators of crime, either, at the time of the alleged occurrence, or, in the Court, but, he made such a statement, at the instance of the Police, as he was tortured to do so. Neither at the time of the alleged occurrence, nor in the Court, the accused, were identified, as the perpetrators of crime by Manoj Kumar and Mohd. Idrish, two eye-witnesses. The prosecution, thus, miserably failed to establish the identity of the accused, as the perpetrators of crime. They are, thus, not connected with the case. The trial Court, was wrong, in holding to the contrary.

14. Now coming to the application, moved by the Police, before the Sub Divisional Judicial Magistrate, Gulla, for asking the accused, to participate, in the identification parade, and, their refusal, to do so, it may be stated here, that in the request, which was made by the Police, it was nowhere mentioned, that the accused, were asked, to muffle their faces, and, they had muffled the same. Even, in the order, passed by the Sub Divisional Judicial Magistrate, Gulla, it is not recorded, that the accused, were either muffled faced or were asked, to muffle their faces. Mohd. Idrish, during the course of his cross-examination, stated that, he came to know about the identity of the

accused, for the first time, when they were shown, to him, in the jail, by the Police. In these circumstances, if the accused, refused to participate, in the identification parade, then no adverse inference, could be drawn, against them. It was held in ***Budhsen and Another Vs. State of U.P., AIR 1970 SC, 1321,*** that facts which establish the identity of an accused person, are relevant under Section 9. As a general rule, the substantive evidence of a witness is a statement made in the Court. The evidence of mere identification of the accused person, at the trial, for the first time, is from its very nature, inherently of a weak character. The evidence, in order to carry conviction, should ordinarily clarify, as to how, and, under what circumstances, the witness came to pick out the particular accused person, and the details of the part, which the accused played, in the crime, in question, with reasonable particularity. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses, in the Court, as to the identity of the accused, who are strangers to them, in the form of earlier identification proceedings. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held, during the course of investigation, with the primary object of enabling the witnesses, to identify persons,

concerned, in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses, and also to furnish evidence, to corroborate their testimony, in the Court. Identification proceedings, in their legal effect, amount simply to this: that certain persons are brought to jail, or some other place, and they make statements, either express or implied, that certain individuals whom they point out are persons, whom they recognize, as having been concerned in the crime. The same do not constitute substantive evidence. These parades are essentially governed by Section 162 Cr.P.C. The principle of law, laid down, with regard to test identification parade in ***Ramanathan Vs. The State of T.N. AIR 1978 Supreme Court 1204*** was as under :-

> *"Identification parades have been in common use for a very long time, for the object of placing a suspect in a line up with other persons for identification is to find out whether he is the perpetrator of the crime. This is all the more necessary where the name of the offender is not mentioned by those who claim to be eye-witnesses of the incident but they claim that although they did not know him earlier, they could recall his features in sufficient details and would be able to identify him if and when they happened to see him. The holding of a test identification in such cases is as much in the interest of the investigating agency or the prosecution as in the interest of the suspect or the accused. For while it enables the investigating officer to ascertain the correctness or otherwise of the claim of those witnesses who claim to have seen the perpetrator of the crime and their capacity to identify him and thereby fill the gap in the investigation regarding the identity of the*

> *culprit, it saves the suspect or the accused form the sudden risk of being identified in the dock by the self same witnesses during the course of the trial. The line up of the suspect in a test identification parade is therefore a workable way of testing the memory and veracity of witnesses in such cases and has worked well in actual practice."*

The proceedings relating to the identification parade, do not constiute the substantive evidence. The substantive evidence, is the one, which is given, in the Court, by the prosecution witnesses. In the instant case, the complainant and his companion Mohd. Idrish, did not identify the accused, as the perpetrators of crime. Under these circumstances, the refusal of the accused, to participate, in the identification parade, did not have any significance, especially when, they had already been shown to the witnesses and were not muffled faced nor were asked to muffle their faces by the Court. The submission of the Counsel for the respondent, therefore, being without merit, must fail, and the same stands rejected.

15. Now coming to the alleged recovery of a sum of Rs. 1200/- and television alongwith its remote, from Babu Lal, accused, it may be stated here, that no identification of these articles was made either by Manoj Kumar or by Modh. Idrish, in the Court, that the said articles were the same, in respect whereof, the dacoity, was allegedly committed, at the petrol pump. The accused, were arrested, after about three months of the alleged occurrence. Television is easily available, in the market. It was not such an article, which could not be planted,

against the accused. There was no identification mark, on currency notes of Rs. 1200/-. It appears that, with a view, to ensure, that the prosecution, succeeded in its case, the investigating agency, planted the television and a sum of Rs. 1200/-, against Babu Lal, accused, so as to prove, that the offence, punishable under Section 412 of the Indian Penal Code, was committed by him. The alleged recovery, from Babu Lal, accused, being highly doubtful, did not constitute any offence, punishable under Section 412 of the Indian Penal Code, especially when, these articles, were not identified, as the one, in respect whereof, the alleged dacoity, was committed. The trial Court, was also wrong, in convicting Babu Lal, accused, for the offence, punishable under Section 412 of the Indian Penal Code.

16. No other point, was urged, by the Counsel for the parties.

17. In view of the above discussion, it is held, that the judgement of conviction and the order of sentence, are not based, on the correct reading and due appreciation of evidence, as also the law, on the point. Had the trial Court, taken into consideration, the aforesaid infirmities and lacunae, it would have certainly come to the conclusion, that the prosecution, had failed, to prove its case, beyond a reasonable doubt. The findings of the trial Court, recording conviction and awarding sentence, to the accused (now appellants), are perverse and illegal, and, as such, are liable to be set aside.

18. For the reasons recorded above, the appeals, are accepted. The judgement of conviction and the order of sentence, rendered by the

trial Court, are set aside. The appellants, are acquitted of the charge framed against them. If the appellants, are on bail, they shall stand discharged of their bail bonds. If they are in custody, they shall be set at liberty at once, if not required in any other case.

19. The concerned Chief Judicial Magistrate, shall comply with the judgment, forthwith and send the compliance report, within a period of 15 days, from the date of receipt of a copy of the same.

05.08.2010 **(SHAM SUNDER)**
Amodh **JUDGE**